IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10/03/2004

CORAM

THE HONOURBLE MR.JUSTICE M. CHOCKALINGAM

SECOND APPEAL NO.1059 OF 1993

1. G. Lakshmi Ammal
2. Chinnammal
3. Vellaiammal
4. Davamani
5. Dhanalakshmi
6. Gowri
7. Rajendran
8. Selvam .. Appellants

-Vs-

Ayyadurai .. Respondent

This second appeal is preferred under Section 100 of CPC against the judgment and decree dated 22.4.1993 passed in AS No.143 of 1991 on the file of the learned District Judge, Chengalpet against the decree and judgment passed in OS No.1/86 dated 30.4.1991 on the file of the learned Sub Court, Kanchipuram.

!For Appellants : Mr.K.P.Gopalakrishnan

^For Respondent : Mr.R.Subramanian

:JUDGMENT

The first defendant and the legal representatives of the deceased second defendant in a suit for specific performance are the appellants herein. Though the defence plea was accepted by the trial court, the same was reversed by the first appellate court, wherein a decree for specific performance was granted in favour of the plaintiff. Hence, this second appeal has been brought forth.

2. The following short facts are noticed in the pleadings of the parties:

The first defendant was the owner of the lands described in the schedule to the plaint. She has entered into an agreement of sale on 3.11 .1985 with the plaintiff. She has agreed to sell the suit lands to the plaintiff for a consideration of Rs.18,250/- and received an advance of Rs.5001/-. As per the sale agreement, the first defendant agreed to receive the balance sale consideration of Rs.13,250/- before the Sub Registrar,

Kancheepuram and register the sale deed in favour of the plaintiff on 20.11.1985 and deliver possession of the same. Though the plaintiff was waiting at the Sub Registrar's Officer at Kancheepuram as agreed between the parties, the first defendant did not turn up. The plaintiff has been all along willing and ready to perform his part of the contract. He issued notice to the first defendant calling upon her to perform her part of the contract. But, the first defendant was making an attempt to sell the property to the second defendant, and hence, the plaintiff has come forward with a suit for specific performance and for a direction to the first defendant to execute the sale deed in favour of the plaintiff by receiving the balance consideration or in alternative direct the first defendant to pay the sale advance of Rs.5001/- to the plaintiff with interest at 12% from the date of the suit till the date of payment by way of damages.

3. The first defendant resisted the suit stating that the first defendant executed an agreement as found in the plaint; that she has already agreed to sell the schedule mentioned property to the second defendant; that she has executed a sale agreement, wherein she agreed to sell it for a sum of Rs.16000/-; she received an advance of Rs.5000/- on that day itself; that she has also handed over the possession of the land to the second defendant on 30.3.1985 itself in view of the part performance of the sale agreement, and thus, the agreement in favour of the second defendant was earlier in point of time, and hence, the agreement executed in favour of the second defendant was to prevail and has to be acted upon and the agreement in favour of the plaintiff was of no legal effect, and hence, the suit was to be dismissed.

4. The second defendant filed his written statement stating that he entered into an agreement for sale with the first defendant in respect of the suit property on 30.3.1985 for a sum of Rs.16000/-; that the first defendant received an advance of Rs.5000/-; that the first defendant has handed over possession of the property on that day itself to the second defendant, and thus, the second defendant has been in possession and enjoyment of the suit property therefrom, and hence, the agreement in favour of the plaintiff dated 3.11.1985 was only false and fraudulent and the agreement in favour of the plaintiff was subsequent in point of time; that pursuant to the agreement in favour of the second defendant, the possession has also been handed over to the second defendant, and hence, no relief could be granted to the plaintiff, and the suit was to be dismissed.

5. The trial court framed necessary issues, tried the suit and denied the relief of specific performance, but there was a decree for the return of the advance amount by the first defendant to the plaintiff. Aggrieved, the plaintiff took it on appeal. The first appellate court reversed the judgment of the trial court and granted the decree in favour of the plaintiff. Hence, this second appeal has been brought forth by the defendants in the suit.

6. At the time of admission, the following substantial questions of law were formulated by this Court for consideration:

1) Whether the lower appellate Court is right in granting decree for specific performance to execute sale deeds, relying upon Ex.A.1 dated 3.11.1985 which is later than Ex.B.1 dated 30.3.1985?

2) Whether the lower appellate Court is right in granting decree for specific performance ignoring the possession with the appellants?

3) Is the plaintiff a bona fide agreement holder entitled for specific performance?

4) Is not possession conclusive to decide the bona fide claim for specific performance?

7. Heard the learned counsel for the appellants and also the learned counsel for the respondent on those contentions.

8. It was a suit for specific performance of an agreement for sale of immovable property entered into between the plaintiff and the first defendant on 3.11.1985 or in alternative return of advance of Rs.500 1/- with interest. It is not in controversy that the first defendant has entered into an agreement for sale under Ex.A.1 with the plaintiff on 3.11.1985 agreeing to sell the property in favour of the plaintiff for a sum of Rs.18,250/- and the first defendant got an advance of Rs.5001/-. According to the plaintiff, who was examined as P.W.1, he was ready and willing to perform his part of the contract. But, there was an evasion on the part of the first defendant. Hence, there arose a necessity for filing the suit. What was contended by the first and second defendants before both the courts below was that the first defendant has already executed an agreement in favour of the second defendant on 30.3.1985 as evidenced under Ex.B.1, wherein the sale consideration was found as Rs.16000/-. The second defendant has also paid an advance of Rs.5000/-, and thus, the second defendant was also put in possession pursuant to Ex.B.1 agreement. Ex.B.1 agreement was the earlier in point of time and it should prevail and not Ex.A.1, which was executed by the first defendant in favour of the plaintiff subsequently. Hence, the question that arose for consideration before the courts below would be whether the agreement under Ex.B.1 had come into existence on 30.3.1985 as contended by the defendants.

9. A careful scrutiny of the available materials would clearly indicate that the said document Ex.B.1 could not be come into existence. The agreement entered into between the plaintiff and the first defendant under Ex.A.1 is an admitted position. It is not the case of the plaintiff that he was put in possession pursuant to the agreement. It is averred in the plaint and P.W.1 has also admitted in his evidence that he was to be put in possession only on the execution of the sale deed by payment of balance consideration of Rs.13,250/-. Both the defendants came with a defence plea stating that the first defendant has executed an agreement in favour of the second defendant on 30.3.198 5 and put the second defendant in possession of the property. There are clear averments to this effect in the written statement filed by the defendants. A perusal of Ex.B.1 agreement would clearly falsify the same. Ex.B.1 reads as follows:

"ehd; fPH;fz;l brhj;ij 30/12/85f;Fs; jh';fs; gj;jpuk; vGjp Ugha; gjpndhuhapuj;Jld; jahuhf ,Ue;J ehd; hp$p!;lh; bra;J jtWk; gl;rj;jpy; rl;lg;go fh";rpg[uk; o/K/ nfhh;oy; eltof;if vLj;J nfhh;l;lhh; K:yk; hp$p!;lh; bra;J bfhz;L ck;Kila RthjPdk; bra;J bfhs;st[k; rk;kjpf;fpd; nwd;"

This would be clearly an indicative of the fact that the possession of the property, in question, was not handed over by the first defendant to the second defendant pursuant to the agreement, but the possession was retained by the first defendant.

10. This court is of the considered opinion that strong circumstance, which goes against the defence plea, is that pursuant to Ex.B.1 agreement, the second defendant was put in possession and he continues to be in possession thereafter. It is true that few witnesses have been examined to prove that Ex.B.1 agreement was entered into between the parties. D.W.2, who was

examined to prove Ex.B.1, was the son of the first defendant, and thus, the lower court was perfectly correct in making a comment on his evidence as one interested. On coming to know about the fake transaction entered into between the first and second defendants, a notice was issued as found under Ex.A.5. Both the defendants, despite receipt of the same, have not come forward to give any reply, and thus, in order to defeat the right of the plaintiff under Ex.A.1 agreement, the defendants have come forward with Ex.B.1, which was a created one, and hence, only on the evidence available, the first appellate court has set aside the judgment of the trial court and granted the relief of specific performance in favour of the plaintiff and the same has got to be sustained.

11. In the result, this second appeal fails and the same is dismissed, leaving the parties to bear their costs.

Index : Yes
Internet : Yes
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To
1. The District Court, Chengalput
2. The Sub Court, Kanchipuram
3. The Record Keeper, VR Section,
High Court, Madras